Kluwer Competition Law Blog

Disclosure of Documents in Parallel Public and Private Enforcement of Competition Law – The ECJ's Judgment in C-57/21 – RegioJet

Nils Imgarten (University of Göttingen) · Wednesday, February 1st, 2023

The preliminary ruling of 12 January 2023 in RegioJet can easily be perceived as a continuation of the jurisprudence on disclosure rules that was developed by the European Court of Justice (the Court or ECJ) in the case of C-163/21 – PACCAR. The PACCAR case concerned specific questions of disclosure of documents, which were not yet prepared by the defendant. Its main highlight was a structured and dogmatic interpretation of Article 5 of the Damages Directive (Directive 2014/104/EU). A summary and brief analysis of the findings is available in my previous post on this blog.

Whilst the judgment in PACCAR focused only on Article 5 of the Damages Directive, at the core of the current decision lies Article 6 of the same Directive. Article 6 deals specifically with privileged documents which under specific conditions, especially if they were prepared expressly for the purpose of public enforcement proceedings, do not have to be disclosed.

Therefore, the direct overlap between both cases is limited to the temporal applicability of the Directive and some general remarks on disclosure rules. When the Court refers to Article 5 of the Damages Directive in the present judgment, this is merely to complement the interpretation of its Article 6 without interfering with the findings in the PACCAR case. However, the systematic interpretation and the interaction between Articles 5 and 6 of the Directive as it is outlined by the Court can be insightful not only for the present context of documents which were submitted to a competition authority but also for further cases on disclosure of documents.

Nonetheless, it comes with no surprise that many arguments now put forward by the ECJ resemble very much what the Court held in PACCAR. It is the same formation of the Court (second chamber) with reporting judge Nils Wahl hearing both cases. As a result, the jurisprudence is consistent, but criticism that could be raised against the judgment in PACCAR equally persists.

The following analysis will guide you through the findings of the Court and conclude with the practical significance of the case.

Brief Summary of the Facts

In the present case, cartel damages litigation was initiated in 2015 by RegioJet, a private train company in the Czech Republic, against ?eské dráhy, the public train network operator. The Czech national competition authority (NCA) had initiated proceedings against ?eské dráhy. In October 2020, the European Commission took over and initiated infringement proceedings itself (Case AT.40156 – Czech Rail, formally closed on 29 September 2022, i.e., after the reference was made; as far as conceivable from public information, the Czech NCA's proceedings are not formally closed, yet).

As a consequence of the Commission's proceedings, the NCA's administrative proceedings were stayed as of November 2016 for the duration of the Commission investigation to avoid conflicting decisions. Whilst the Commission investigation was ongoing, in October 2017 RegioJet filed for disclosure of documents against ?eské dráhy. The lower instance national court ordered the disclosure of some documents whilst dismissing it for others. The disclosed documents contained, first, information specifically prepared by ?eské dráhy for the purpose of proceedings before the NCA and, second, information which was required to be created and kept outside the context of those proceedings, such as train line records, quarterly reports on public railway transport and the list of routes operated by ?eské dráhy.

The appeal court mainly upheld this order but adopted measures to place the evidence under sequestration and disclose it only to the parties, their representatives and experts and only with the prior agreement of the judge hearing the case. The last instance Court on an appeal on a point of law stayed its proceedings and asked several questions to the ECJ (see para 35 for the full text) regarding the obligation to disclose documents in the case of parallel public and private enforcement and the legality and practice of sequestration of documents as practised by the lower instance court.

Temporal Applicability

On a preliminary note, the Court again had to deal with the temporal applicability of the Damages Directive. This question can (and will) always be raised for cases based on facts predating the transposition deadline of the Directive with proceedings initiated after the transposition of the Directive. The Court could base its reasoning entirely on the *PACCAR* case. There it had already been established that Article 5 of the Damages Directive, concerning disclosure generally, is a procedural provision in the sense of Article 22(2) of the Directive. It therefore can be applied to proceedings which were initiated after the transposition of the Damages Directive. It is evident that these findings must logically be extended to Art. 6 of the Directive, which merely specifies and nuances Art. 5 for specific categories of documents.

The finding of the Court in *PACCAR*, which is now confirmed in *RegioJet* (cf. paras 42-44), was not that clear from the outset. As some might remember, the question of temporal applicability was highly disputed in the *Volvo/DAF* case (C-267/20). If you want to know more about the doctrinal interpretation of Art. 22 of the Damages Directive and why the ECJ's judgment in *PACCAR* might be more convincing than some of the findings (by another chamber of the Court) in *Volvo/DAF*, you can read about it in detail in my articles on these judgments.

Systematic Relationship between Articles 5 and 6 of the Damages Directive – From the

General to the Specific Rules of Disclosure

Whereas Article 5 sets out a number of general rules on the disclosure of evidence in proceedings relating to actions for damages for infringements of competition law, Article 6 lays down rules that are "*specific to the disclosure of evidence contained in the file of a competition authority, which in particular demonstrate a level of protection that differs according to the information requested and the need to preserve the effectiveness of proceedings conducted in the public sphere*" (paras 55-56).

Therefore, Article 5 needs to be applied to all disclosure cases. Article 6 will be applied additionally in cases of specific documents which enjoy special protection from disclosure due to the integrity of public enforcement.

Three Shades of Grey in Article 6 of the Damages Directive – The Concept of Protection of Documents Prepared for Competition Authorities

Under Article 6, there are three categories of evidence. First, leniency statements and settlement submissions enjoy full protection from disclosure (Article 6(6)). These are called the documents on the "*black list*" (para 57). Such documents however did not exist in the present case.

Second, information prepared specifically for administrative proceedings initiated by a competition authority, information drawn up by that authority, and withdrawn settlement submissions, are protected under Article 6(5). They can only be disclosed after a competition authority, by adopting a decision or otherwise, has closed its proceedings. This forms the so-called "*grey list*" because disclosure is limited but not excluded (para 58).

Any other documents not falling under the grey or black list can be disclosed at any time (Article 6(9)). This forms the "*white list*" (para 59). Article 6 does not concern the disclosure of such documents. Disclosure, however, must of course be in accordance with Article 5 of the Directive and the applicable national procedural law.

In the present case, all preliminary questions to some extent touch on the question of categorization of evidence on the grey list and the scope of protection thereunder.

No per se Exclusion of Disclosure whilst Public Enforcement is Ongoing

Under the first preliminary question, the ECJ had to clarify whether Article 5 generally prohibits the disclosure of documents for the duration of ongoing public enforcement. Such a general rule is not included in the directive. Article 6 limits disclosure only to specific categories of documents. Under Article 5, as the Court reaffirms, disclosure is subject to a strict proportionality test (cf. in particular paras 72-75).

However, public and private enforcement are complementary and can be carried out simultaneously (para 66). There is no risk of conflicting decisions in the sense of Article 16 of Regulation 1/2003 if documents are already disclosed before the final decision by the authority.

Nonetheless, there can be a serious conflict of objectives in such parallel proceedings. For some categories of documents, Article 6 foresees this conflict and therefore limits disclosure. For all other cases, as the Court now emphasizes, disclosure remains possible as they fall under the white list, but it will be subject to a strict proportionality review under Article 5(3) (cf. para 78). The ECJ necessarily leaves it to the national courts to apply this proportionality review. Find out more about practical implications at the final evaluation of the judgment at the end of this blog post.

The Scope of Protection under the "*Grey List*"

If, in principle, disclosure of all documents on the white list is generally possible, the relevance of the categorization of some documents on the black or grey list increases.

First, the Court dealt with the significance of the fact that the NCA's proceedings in the present case were stayed and were not formally concluded. On the question of whether this can be equated with a "*closing*" of proceedings in the sense of Article 6(5) of the Damages Directive (third preliminary question), the ECJ was quite clear. Neither from its wording nor from the objectives of the norm, it can be deduced that a stay of proceedings is equal to its closure (paras 81-90). Therefore, the current situation is generally (still) covered by Art. 6 of the Damages Directive and documents can in principle be categorized on the grey list with the privilege of not being disclosed before any public enforcement is definitely finished.

The Grey List is Fully Harmonised – Stricter national rules are precluded by the Directive

On the decisive question of whether certain documents in the national proceedings could be included on the grey list, the referring court asked whether, according to national law, it would be possible to include not only the disclosure of information 'prepared' specifically for the proceedings of the competition authority but also that of all information 'submitted' for that purpose.

This must be answered with reference to Articles 5(8) and 6(5)(a) and (9) of the Damages Directive (cf. para 94). According to the Court, a systematic interpretation of these provisions of the Directive as well as the Recitals 25 and 28 leads to a strict interpretation of documents "*prepared*" for an authority's investigation. As the given examples in Recital 25 (replies to requests for information from the competition authority or witness statements) suggest; only documents that were not pre-existing to the investigation but were prepared specifically in the context of that public investigation can be covered by the grey list. Otherwise, access to documents whilst ongoing public enforcement would be nearly impossible because any relevant document would most likely be part also of the authority's file. This would blur – if not extinguish – the clear system of specific criteria set forth by the directive to qualify a certain document for the grey (or black) list. Therefore, the strict interpretation as emphasized by the Court is the only solution, which gives effect to the Directive and allows for a balanced system of disclosure.

That is confirmed by Article 6(9) and Recital 28 thereto which clarifies that pre-existing information forms part of the white list (para 103). Therefore, all documents that were submitted to the authority but were not prepared explicitly for it are on the white list. For their disclosure, only the procedure and proportionality test under Article 5 of the Directive must be followed.

Lastly, any more contingent national rules would be contrary to EU law. As Article 5(8) points out, the Member States only have a very limited margin of discretion when transposing the disclosure rules. They can allow further reaching disclosure than foreseen by the Directive but they must not go below the standard set forth by Articles 5 and 6 of the Damages Directive (cf. paras 107-109). Consequently, any categorization of norms on the grey (or black) list by national law cannot be further reaching than the one foreseen by the Damages Directive.

How to examine what falls under the "*Grey List*"

In its answer to the fourth and fifth questions, the ECJ sets out how to examine in a particular case whether a piece of evidence falls under the grey list or not. This question can often be delicate because the relevant piece of evidence cannot be openly discussed in the proceedings for disclosure as that would render the whole issue of protection of that evidence obsolete. After the claimant had the possibility to study the demanded evidence, it would already be fully contended.

Therefore, a preliminary confidential examination seems reasonable. Such a procedure is foreseen by Article 6(7) of the Damages Directive, but the application is clearly limited to Article 6(6), i.e. the blacklist. That led the referring court to question whether a similar procedure, such as the sequestration as practised by the Czech lower instance court, is possible regarding '*grey list documents*'.

According to the ECJ, although the such procedure is not provided for by the Directive, it can be applied under national procedural law (cf. para 122). Without stating it explicitly, this underlines the principle of national procedural autonomy in EU law. Often, procedural autonomy must be balanced with the principle of effectiveness of an EU law provision. In the present case, however, the national procedural rule of sequestration seems to even expand the effectiveness of the right to discovery as provided for by the Directive. Through the possibility of prior review by the judge hearing the case, documents which would possibly otherwise not be available to the claimant can be examined even before public enforcement proceedings are concluded. If these examinations lead to the conclusion by the national judge that the evidence at stake does not form part of the conclusive category of the 'grey list' under Article 6(5), it automatically falls under the white list and thus must be disclosed immediately according to Article 6(9) of the Directive, obviously under the assumption that all general conditions of Article 5 of the Directive are fulfilled.

If to the contrary, a document forms part of the grey list according to the national judge hearing the case, it must not be disclosed to the claimant or any other third party. This is additionally clarified by the answer to the fifth referred question. Thereto, the ECJ holds that during the procedure of examination, e.g. under sequestration as in the present case, the evidence must not be disclosed to anyone except the judge (cf. paras 130-132). Everything else would run contrary to the (possible) protection that is guaranteed by Article 6(5) of the Directive.

Alternatively, risks of premature disclosure could be mitigated by disclosing information to a small confidentiality ring (see Commission communication on the protection of confidential information, paras 50ff.) However, Article 6 of the Damages Directive does not aim at protecting confidential information but at balancing the objectives between public and private enforcement. It does not precisely foresee confidentiality rings or any similar measures. The Court, therefore, did not refer to the mentioned Commission communication. If in another case, a national court would deem

such measures suitable, it could ask the ECJ again in a preliminary question if it was permitted to apply confidentiality rings in a case of uncertainty whether a document forms part of the grey list. Nonetheless, it is submitted that a prior review of the national court itself – as it was proposed by the Czech referring court – is superior to a confidential examination by the parties. It is both closer to the system of the Damages Directive in Art. 6(7) and more secure regarding the protection of public enforcement, which is the main objective of Art. 6 of the Directive.

Practical Significance of the Ruling – Everything left to the National Courts?

The judgment can be summarized as follows: disclosure of documents can be ordered despite ongoing (or stayed) public enforcement proceedings as long as the relevant documents do not form part of the black or grey lists under Article 6 of the Directive. The classification under the grey list is determined exclusively by EU law and cannot be extended by national law. It covers only documents prepared specifically for the purposes of public enforcement proceedings and not all documents that were submitted to an authority. Whether these conditions are met is assessed by the competent national court. That national court can order – if provided for by national procedural law – the documents to be put in sequestration without access by the parties until the court approved that the documents form part of the white list. Under no circumstances should the national court order disclosure of documents without having duly checked that they do not form part of the grey or black list under Articles 6(5) and 6(6) of the Directive. Before the disclosure, the national court must – as always – check carefully the proportionality of the disclosure request.

The last point might be the most contingent on the whole judgment. Overall, this judgment is again, as the one in *PACCAR*, a claimant-friendly decision in favour of disclosure. However, proportionality seems to remain the largest risk for claimants and the possibility for defendants and national courts to argue for a denial of disclosure. The general line of argument regarding proportionality is very comparable to what the Court held in *PACCAR* (see again my analysis there). The following discussion is – *nota bene* – without prejudice to issues of confidentiality of documents, which would require a specific balancing according to Article 5(4) of the Damages Directive. As the Court rightfully distinguishes, the protection attributed to documents under the grey and black lists can be performed regardless of the fact whether such documents contain confidential information (cf. para 131).

Again, the most difficult task is returned by the ECJ to the national judge. The criteria to be applied under the proportionality test remain partly unclear, as in *PACCAR*. It does not go beyond a repetition of the wording of Article 5(3) of the Damages Directive which sets out basic, but not very specific, guidance. The meaning and scope of Article 5(3) are not directly interpreted by the Court. The few explicit references in the judgment are not unequivocal.

Generally, proportionality refers under EU law to a threefold test.

A measure must be suitable to attain an objective protected by law (a first step that is often neglected due to its obviousness). The intervention with the rights of third parties must be necessary, i.e., there is no other less radical measure with equivalent effects. Third, and most importantly, the interests of the applicant and the other affected persons must be balanced.

The right to seek damages for infringements of competition law is an objective which is protected by the Damages Directive and the Treaties. To order the disclosure of certain documents from the

defendant is certainly suitable to attain that objective. Whether it is necessary can often be questioned, for example with an argument based on the irrelevance of certain documents. There will, however, always be a high degree of uncertainty about the relevance of evidence before it had been disclosed and about the merits of the claimant's case before it had been adjudicated. Therefore, the balancing of interests and of the relevant uncertainties will be decisive for the decision on disclosure.

The ECJ gives some insights into the present judgment that could guide national courts. Nonetheless, it is not entirely clear which interests should be included in the balancing by the national court and at which weight.

According to the ECJ, national courts are "*called upon to carry out a thorough examination of the request submitted to them as regards the relevance of the evidence requested, the link between that evidence and the claim for damages submitted, whether that evidence is sufficiently precise and as regards its proportionality. (…) Particular attention should be paid to preventing 'fishing expeditions', namely non-specific or overly broad searches for information*" (paras 72-73). That underlines the example provided by Article 5(3)(b) of the Damages Directive.

In the context of the procedural questions concerning the examination of the nature of the relevant evidence by the national judge, the Court stresses again the importance of a strict proportionality test (which is part of the general review under Article 5(3)). The national court should take into account "t*he extent and cost of the disclosure of evidence, the relevance of the evidence whose disclosure has been sought for substantiating the merits of the claim for damages or, in addition, of whether the request for the disclosure of evidence in the competition authority's file has been set out in specific terms as regards the nature, purpose or contents of the documents*" (para 126; see also Article 5(3)(b) of the Directive). Thereunder, specific relevance could result from the fact that a pre-examination under sequestration might increase the cost and duration of proceedings. However, these additional costs will probably not often play a decisive role. Rather, it is conceivable that proportionality is applied as a general balancing of interests between claimant and defendant.

The only clear and strong argument thus seems to be the relevance of the evidence. It can be paraphrased in two comparisons. The more precise a request for the disclosure of documents becomes, the higher the likelihood of it being proportional. The more conclusive and direct the link of a certain piece of evidence to the infringement of competition laws and the non-contractual liability of the defendant thereunder is demonstrated, the higher the likelihood of the disclosure of documents being proportional. A strict standard must however not lead to the impossibility of the defendants satisfying the proportionality criteria. Although the Court had not formulated it as clearly, there is a certain presumption in favour of disclosure, which is supported by the Directive and the Court's jurisprudence. As the disclosure facilitates the effectiveness of competition law enforcement, it is generally favourable. All limits to disclosure must themselves be proportionate, too, as they limit the effectiveness of private enforcement and therefore the *effet utile* of Art. 101 TFEU.

In the end, the application of proportionality will be subjective to a certain degree and depend on the individual conviction of the judges hearing the case. Such ambiguity in favour of a certain legal "*grey zone*" is compatible with European law, particularly with the Damages Directive as long as the disclosure is not rendered impossible or excessively difficult. One should not forget that also the approach of the Directive to disclosure is a gradual one. The present judgment seems to be a

step in the direction of harmonization and further implementation of the Directive's objectives.

To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe here.

This entry was posted on Wednesday, February 1st, 2023 at 9:00 am and is filed under Source: UNCTAD">Damages, Disclosure, European Court of Justice, National competition authorities (NCAs), Railway, References for a preliminary ruling
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.